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No. 90-806

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

CITY OF WILLCOX, ARIZONA,  
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,  
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,  
AMERICAN PUBLIC GAS ASSOCIATION,  
and ASSOCIATED GAS DISTRIBUTORS,

*Petitioners,*  
v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

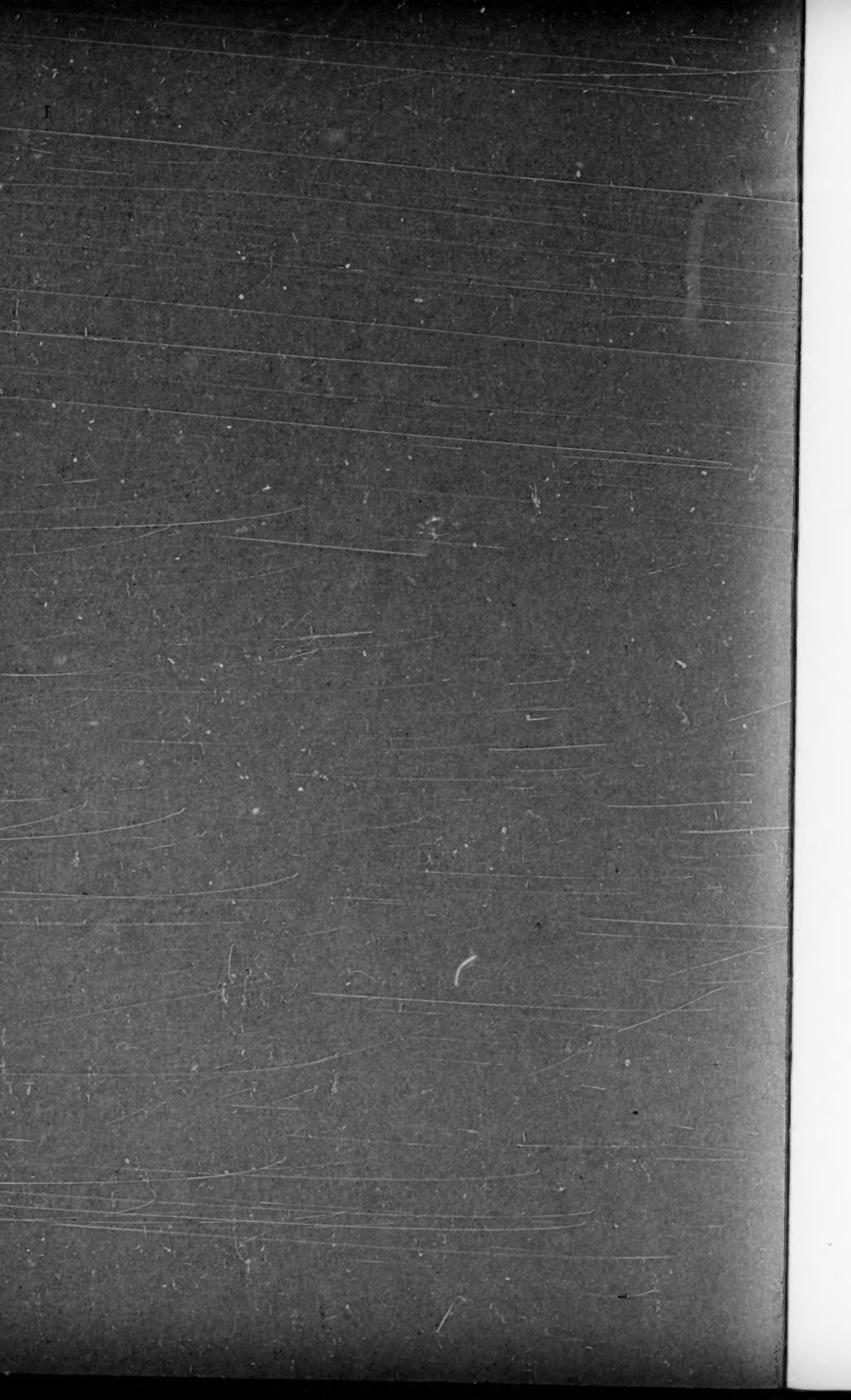
On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

BRIEF OF RESPONDENT  
INTERSTATE NATURAL GAS ASSOCIATION  
OF AMERICA IN OPPOSITION

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January 23, 1991



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ARIZONA ELECTRIC POWER COOPERATIVE, INC.,  
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**On Petition for Writ of Certiorari to the  
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**BRIEF OF RESPONDENT  
INTERSTATE NATURAL GAS ASSOCIATION  
OF AMERICA IN OPPOSITION**

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**STATEMENT OF THE CASE**

This case brings before the Court an isolated component of the Federal Energy Regulatory Commission's (Commission) Order No. 436,<sup>1</sup> which commenced the process of

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<sup>1</sup> *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. [Regs. Preambles 1982-85] ¶ 30,665; *Order on Reh'g*, Order No. 436-A, FERC Stats. & Regs. [Regs. Preambles 1982-85] ¶ 30,675, *rev'd sub nom. Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987),



transforming interstate natural gas pipelines from primarily merchants of natural gas to primarily transporters of natural gas owned by others. Specifically at issue is the Commission's provision for the pregranted abandonment of any transportation service provided under a blanket certificate upon termination of the underlying contract. In this context, pregranted abandonment complements another Commission policy under Order No. 436—contract demand conversion. This policy gave the sales customers of natural gas pipelines a new option, which their contracts did not provide, of converting all, or part, of their sales service to an equivalent amount of transportation service, which the pipeline will render under its blanket certificate. By electing this newly granted option to receive service under the blanket certificate, the customer accepts the terms of that service, including pregranted abandonment.

The pregranted abandonment regulation was appealed to the D.C. Circuit Court of Appeals where it faced a two-pronged attack, one challenging the Commission's authority under the Natural Gas Act of 1938, 15 U.S.C. § 717, *et seq.* (1982) (NGA), to allow pregranted abandonment; the other assailing the Commission's justification for the specific regulation. The court below ruled that the Commission had ample authority to permit pregranted abandonment under Section 7(b) of the NGA, 15 U.S.C. § 717 (b) (Pet. App. 38a), but found that the Commission had failed to adequately justify its exercise of that authority under the circumstances presented. Pet. App. 42a. *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990) (AGA II). Thus, the court remanded the pregranted abandonment regulation to the Commission with instructions to either support the rule in its entirety or to define the types of situations in which pregranted abandonment should be allowed. Pet. App. 43a. The

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*cert. denied*, 485 U.S. 1006 (1988); Order No. 500, III FERC Stats. & Regs. ¶ 30,761 (1987), *remanded sub nom. American Gas Association v. FERC*, 888 F.2d 136 (D.C. Cir. 1989).



Commission was directed to act within 90 days of the issuance of the court's mandate, *i.e.* February 13, 1991.

On November 21, 1990, Petitioners filed with this Court a "Petition For Writ Of Certiorari To The United States Court of Appeals For The District of Columbia Circuit" requesting that the Court review the *AGA II* decision in conjunction with its review of *Mobil Oil Exploration & Producing Southeast, Inc. v. FERC*, 885 F.2d 209 (5th Cir. 1990) (*Mobil v. FERC*), then pending before the Court on a writ of certiorari to the Fifth Circuit Court of Appeals. On January 8, 1991, this Court issued its decision in *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies*, 59 U.S.L.W. 4054 (*Mobil v. UDC*) which not only rendered the requested relief moot, but definitively disposed of the issues raised by Petitioners, as demonstrated below.

### SUMMARY OF ARGUMENT

Review by this Court is not warranted. Petitioners have failed to present grounds adequate to merit a granting of their petition. Namely, Petitioners have failed to present a new or novel question of law, but instead have attempted to bring before this Court a matter which is the subject of well settled law. In particular, Petitioners have inadequately supported their claims (1) that the decision of the court below violates the requirements of NGA Section 7(b), (2) that there is a conflict between the decision below and a decision of the Fifth Circuit, and (3) that public interest considerations mandate immediate action by this Court. With respect to the first two claims, this Court's decision in *Mobil v. UDC* puts to rest any assertions that the decision below contravened the statutory requirements of NGA Section 7(b) as well as renders moot any contentions of conflict between the circuits. In regard to their final claim of compelling public interest considerations, Petitioners, through the use of generalities, have attempted to create an illusion of severe public harm

resulting directly from the regulation. Not only do their assertions have no basis in fact, but they also address an issue—the adequacy of the regulation’s public interest protection—which has been remanded to the Commission and thus is not ripe for review.

## ARGUMENT

### I. PETITIONERS’ ASSERTIONS THAT THE DECISION BELOW IS CONTRARY TO THE REQUIREMENTS OF NGA SECTION 7(B) AND THAT IT CONFLICTS WITH A FIFTH CIRCUIT DECISION WERE BOTH DISPOSED OF BY THIS COURT’S DECISION IN *MOBIL v. UDC*.

Petitioners’ request for certiorari rests on two central claims: (1) that the D.C. Circuit’s affirmance of the Commission’s power to authorize pregranted abandonment in a generic rulemaking is contrary to the express requirements of Section 7(b) of the NGA; and (2) that such decision is in conflict with the Fifth Circuit’s decision in *Mobil v. FERC*. Pet. at 7. Both of these claims fail in light of this Court’s decision in *Mobil v. UDC*.

#### A. *Mobil v. UDC* Reaffirms That The Commission Can Fulfill Its Section 7(b) Obligations Through A Generic Rulemaking.

Petitioners assert that the public interest inquiry required under Section 7(b) “renders the use of generic rulemaking proceedings unlawful” as it “permit[s] abandonments years in advance without any case-specific factual inquiry.” Pet. 10. This assertion is based on an incorrect statement of the law, as illustrated by *Mobil v. UDC*’s confirmation of the Commission’s well established right to fulfill its Section 7(b) obligations in advance by way of a rulemaking procedure rather than individual adjudication, and ignores the opportunities for case-specific review which have been provided by the Commission.

In *Mobil v. UDC* this Court analyzed the Commission’s obligations under NGA Section 7(b). These obligations—

namely (a) granting its permission and approval of the abandonment; (b) finding that the present or future public convenience and necessity permits the abandonment; and (c) holding a due hearing prior to the abandonment—have been more than adequately met by the Commission in the case at hand.

First, Order No. 436, as reaffirmed in Order Nos. 500, 500-H and 500-I, constitutes the Commission's authorization of pregranted abandonment of open access transportation upon termination of the underlying service contract. As reaffirmed by this Court in *Mobil v. UDC*, "nothing in § 7(b) prevents the Commission from giving advance approval of abandonment." *Mobil v. UDC*, 59 U.S.L.W. at 4059, citing *FPC v. Moss*, 424 U.S. 494, 499-502 (1976).

Second, the Commission, through its rulemaking procedures, made the appropriate findings that pregranted abandonment was required by the present or future public convenience and necessity. Specifically the Commission found that pregranted abandonment was in the public interest as it helps to ensure that more parties will have an opportunity to obtain transportation service, as well as serving to enhance competition and reduce the likelihood of capacity hoarding. Order No. 500-I, Pet. App. at 310a-311a. The fact that these findings were made across the board does not undercut their import. "[Section] 7(b) does not compel the agency to make 'specific findings' with regard to every abandonment when the issues involved are general." *Mobil v. UDC*, 59 U.S.L.W. at 4059.

Finally, this Court has historically recognized that the statutory requirement for a hearing does not preclude the Commission from particularizing statutory standards through a rulemaking process. See *Mobil v. UDC*, 59 U.S.L.W. at 4059, citing *Heckler v. Campbell*, 461 U.S. 458, 467 (1983); *Permian Basin Rate Cases*, 390 U.S. 747, 774-777 (1968); *FPC v. Texaco, Inc.*, 377 U.S. 33, 41-44 (1964); *United States v. Storer Broadcasting Co.*,

351 U.S. 192, 205 (1956).<sup>2</sup> Through its use of a rule-making procedure the Commission provided an "industry wide" hearing. The subject of pregranted abandonment was addressed by a broad array of industry and customer representatives which filed requests for rehearing of the Commission's Order No. 500 series of decisions. Through its orders with respect to these requests, the Commission addressed this multitude of comments, including arguments postulating situations in which the public interest could hypothetically be placed in jeopardy by pregranted abandonment. Pet. App. 312a-326a.

In addition to the more generic analysis conducted in the rulemaking procedure, public interest considerations, more narrowly tailored to the circumstances of a specific pipeline, are addressed in the forum of a pipeline's application for a blanket transportation certificate under which transportation services with pregranted abandonment will occur. The application review procedure is a case-specific adjudication in which all interested parties have the opportunity to present their views regarding pertinent issues. Added protection is found in the Commission's assurance that it will address individual circumstances as necessary.<sup>3</sup> In Order No. 500-I, the Commission directly addressed arguments that pregranted abandonment adversely affects customers' bargaining power and their

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<sup>2</sup> Petitioners have acknowledged this point in the court below, conceding that "the Commission is not foreclosed from acting by general rule to adopt a procedure under which pregranted abandonment may be authorized in appropriate cases." Joint Initial Brief of Indicated Local Distribution Companies, State Commissions, State Agencies, and End Users on Issue of Pregranted Abandonment of Firm Service at 8, *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990).

<sup>3</sup> In *Mobil v. UDC*, this Court found that the mere right to file a complaint with the Commission was sufficient to refute objections that the Commission made no provision for individual determinations under its Order No. 451 abandonment procedures. 59 U.S.L.W. at 4059.

ability to meet their public service obligations by assuring that it would “consider any such allegations when they are presented in a general rate case, a GIC proceeding, or a separate complaint proceeding.”<sup>4</sup> Pet. App. 312a.

Thus, it is readily apparent that Petitioners’ Section 7(b) argument—that the Commission, by pregranting abandonment without providing for case-specific review, circumscribed its statutorily mandated public interest inquiry—must fail. The Commission has well grounded authority to preauthorize abandonment, which authority can be exercised through a rulemaking procedure.

**B. The Decision Of The Court Below Does Not Conflict With The Fifth Circuit Decision In *Mobil v. FERC*.**

Petitioners claim that the decision rendered by the Fifth Circuit in *Mobil v. FERC* conflicts with the court’s ruling below. Pet. 11. This claim was premised on the fact that both the Commission regulation at issue in this case and the one before the Fifth Circuit authorized pregranted abandonment on a generic basis. Thus, Petitioners contend that given the fact that the Fifth Circuit overturned the Commission’s actions with respect to pregranted abandonment, while such actions were upheld by the D.C. Circuit, a conflict exists between the circuits which compels

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<sup>4</sup> The Commission’s assurances have been applied in practice. In its review of Transcontinental Gas Pipe Line Corp.’s application for a certificate implementing, among other things, a gas inventory charge, the Commission set for hearing, by means of written submissions, the issue of whether pregranted abandonment of transportation service upon the expiration of service agreements should be limited if the pipeline adopts a GIC. *Transcontinental Gas Pipe Line Corp.*, 47 FERC ¶ 61,244 at 61,849, *reh’g denied*, 48 FERC ¶ 61,199 (1989). The Commission later approved a settlement wherein Transco agreed to waive the right to pregranted abandonment with respect to firm transportation resulting from conversions by sales customers. *Transcontinental Gas Pipe Line Corp.*, 48 FERC ¶ 61,399 (1989), *reh’g granted in part*, 50 FERC ¶ 61,442 (1990).



review by this Court. Any arguable conflict between the Circuits was dispelled when this Court reversed the Fifth Circuit and upheld the Commission's authority to pregrant abandonment on a generic basis.<sup>5</sup>

## **II. PREVENTION OF HARM TO THE PUBLIC INTEREST DOES NOT COMPEL REVIEW OF THE DECISION BELOW.**

Petitioners' argument that prevention of harm to the public requires this Court to review the decision of the court below is without merit. Pet. 14. Petitioners attempt to create a sense of urgency for their petition by asserting that the pregranted abandonment regulation at issue "permit[s] a direct and immediate termination of gas service to local distribution companies (LDCs) and their residential and commercial consumers without any regulatory oversight." Pet. 15. Not only is this a broad misstatement of the regulation's effect which should not be given any weight by the Court, it presents a direct attack on the adequacy of the pregranted abandonment regulation at issue, a matter which has been remanded to the Commission, and thus is not ripe for review by this Court.

As an initial matter, Petitioners mischaracterize the effects of the regulation. Pet. at 14-15. Abandonment of service under the subject regulation is not direct and immediate. Rather abandonment will occur upon expiration of the underlying contract which has been agreed to by the pipeline and its customer.<sup>6</sup> Moreover, regulatory over-

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<sup>5</sup> Although this Court's decision is dispositive on the issue of conflict between the circuits, it should be noted that the holdings of the two circuits did not clash. Neither court made an across-the-board ruling that the Commission is without authority to provide for pregranted abandonment through a rulemaking. Rather, each court deliberated and ruled upon the exercise of that well accepted authority under the facts and circumstances before it.

<sup>6</sup> Customers may negotiate for an evergreen or rollover clause to extend the life of a contract beyond the length of its initial term.

sight of blanket transportation service provided by pipelines (and procedures for its termination) is pervasive. The rates, terms and conditions of service are fully regulated by, and the contracts themselves are on file with, the Commission. Additionally, case-specific grievances relating to the implementation of pregranted abandonment can be heard. To date no such complaint has been brought before the Commission. In sum, the Petitioners' attempt to cast the ruling of the court below as effecting a harm to the public interest so as to compel this Court to grant a writ of certiorari is mere theatrics which should carry no weight with this Court.

Second, the issue of the adequacy of the abandonment regulation in light of the public interest standard under the NGA is not ripe for review as it is the very issue which the D.C. Circuit remanded to the Commission for reconsideration. Pet. App. at 42a-43a. This Court has discerned a twofold inquiry to assess an issue's ripeness for judicial consideration: (1) the fitness of the issue for judicial review, which focuses on whether the regulation in question is a final agency action; and (2) the hardship to the parties if judicial relief is denied at this stage. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-49 (1967); *Toilet Goods Association v. Gardner*, 387 U.S. 158, 162 (1967); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 200-01 (1983).

The pregranted abandonment regulation at issue here cannot be held to be final agency action as the Commission is now under a Court of Appeals mandate to reconsider that regulation. Specifically, the court has directed the Commission to issue a final order defining the param-

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In *Natural Gas Pipeline Company of America*, 48 FERC ¶ 61,306 (1989), the pipeline proposed, and the Commission approved, a settlement which granted firm shippers the right to continue transportation service under a negotiated evergreen contractual provision.



eters, if any, within which pregranted abandonment will be allowed and explaining how such abandonment is consistent with the consumer protection interest underriding the NGA. Pet. App. 42a-43a.

Moreover, Petitioners have not shown any hardship which would be inflicted on them if the Court did not act at this time. As noted, the Commission must act on the mandate of the court below in an expeditious fashion (within 90 days, *i.e.*, February 13, 1991). Until the Commission acts, the final terms and conditions of pregranted abandonment are unknown and its ultimate effect on Petitioners, if any, is, therefore, also unknown and speculative. Until the Commission acts, the Petitioners are not without redress for any injustices which they surmise may have been imposed on them. To the contrary, the subject orders explicitly state that the Commission will consider any allegations relating to the adverse impacts of pregranted abandonment in a number of forums, *e.g.*, a general rate case or a complaint proceeding. Pet. App. 312a.

### CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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January 23, 1991

## APPENDIX A

MEMBER COMPANIES OF  
INTERSTATE NATURAL GAS ASSOCIATION  
OF AMERICA

AlaTenn Resources, Inc.  
Alberta Natural Gas Company Ltd.  
Arkla Pipeline Group  
Blue Dolphin Pipeline Company  
The Coastal Corporation  
Columbia Gas Transmission Corporation  
Consolidated Natural Gas Company  
El Paso Natural Gas Company  
Enron Corp.  
Equitrans  
Foothills Pipe Lines (Yukon) Ltd.  
Granite State Gas Transmission Inc.  
Great Lakes Gas Transmission Company  
KN Energy, Inc.  
Lone Star Gas Company  
Michigan Gas Storage Company  
MidCon Corp.  
National Fuel Gas Supply Corporation  
Northern Border Pipeline Company  
Pacific Gas Transmission Company  
Pacific Interstate Company  
Panhandle Eastern Corporation  
Public Service Company of Colorado  
Questar Pipeline Company  
Sonat Inc.  
Tenneco Gas  
Texas Oil & Gas Corporation  
TransCanada Pipelines  
Transco Gas Company  
United Gas Pipe Line Company  
Valero Interstate Transmission Company  
Valley Gas Transmission, Inc.

Westcoast Energy Inc.

The Williams Companies, Inc.

Williston Basin Interstate Pipeline Company

Wintershall Corporation

